

Update: Criminal Procedure Monograph 8—Felony Sentencing

Part II—Scoring the Statutory Sentencing Guidelines

8.6 Scoring an Offender's Offense Variables (OVs)

K. OV 10—Exploitation of a Vulnerable Victim

2. Case Law Under the Statutory Guidelines

Vulnerability—age of the victim.

Insert the following text after the partial paragraph at the top of page 62:

A five-year age difference between a defendant and a complainant may justify a score of ten points for OV 10. *People v Johnson*, ___ Mich ___, ___ (2006). In *Johnson*, the Michigan Supreme Court stated:

“We also agree that the trial court did not err in scoring OV 10 at ten points. . . . As the Court of Appeals explained, ‘[w]here complainant was fifteen years old and defendant was twenty, the court could determine that defendant exploited the victim’s youth in committing the sexual assault [citation omitted].’” *Johnson*, *supra* at ___.

8.6 Scoring an Offender's Offense Variables (OVs)

L. OV 11—Criminal Sexual Penetration

2. Case Law Under the Statutory Guidelines

Insert the following text after the November 2005 update to page 66:

**People v Cox*,
268 Mich App
440 (2005),
discussed in the
November 2005
update to page
66.

In *People v Johnson*, ___ Mich ___, ___ (2006), the Michigan Supreme Court further defined OV 11 as applied to cases in which a defendant is convicted of more than one count of first-degree criminal sexual conduct (CSC-1). In *Johnson*, the trial court scored OV 11 at 25 points because the defendant had twice penetrated the victim. Like the defendant in *Cox*,* the defendant in *Johnson* was charged with and convicted of CSC-1 for each penetration. In *Cox*, 25 points were appropriately scored because the two penetrations/convictions arose from the same sentencing offense. In contrast to *Cox*, however, neither of the penetrations in *Johnson* arose from the same sentencing offense. In *Johnson*, the penetrations occurred on different dates. In the absence of any evidence that the defendant's conduct on one date arose from his conduct on the other date, the two penetrations did not arise from either of the two CSC-1 offenses for which the defendant was sentenced. Therefore, because the two penetrations in *Johnson* did not arise from the sentencing offense, the trial court erred in scoring OV 11 at 25 points instead of 0 points.

8.6 Scoring an Offender's Offense Variables (OVs)

N. OV 13—Continuing Pattern of Criminal Behavior

2. Case Law Under the Statutory Guidelines

In *People v Francisco*, ___ Mich ___ (2006), the Michigan Supreme Court ruled that the issue involving OV 13 was wrongly decided in *People v McDaniel*, 256 Mich App 165 (2003). Therefore, on page 70, delete the first paragraph in this sub-subsection and insert the following text:

In *People v Francisco*, ___ Mich ___, ___ (2006), the Michigan Supreme Court ruled that the five-year period to which OV 13 refers must include the sentencing offense. OV 13 assesses points when a sentencing offense is part of a pattern of felonious activity. According to MCL 777.43(2)(a), a pattern consists of three or more crimes committed in a five-year period “including the sentencing offense.” In *Francisco*, the trial court scored OV 13 at 25 points for the defendant’s three previous felonies that occurred in 1986, even though the offense for which the defendant was being sentenced occurred in 2003.

Based on the plain language of MCL 777.43, the *Francisco* Court explained:

“[I]n order for the sentencing offense to constitute a part of the pattern, it must be encompassed by the same five-year period as the other crimes constituting the pattern.

* * *

“Because MCL 777.43(2)(a) states that the sentencing offense ‘shall’ be included in the five-year period, the sentencing offense *must* be included in the five-year period. Therefore, MCL 777.43(2)(a) does preclude consideration of a five-year period that does not include the sentencing offense.” *Francisco, supra* at ____.

Part VI—Fashioning an Appropriate Sentence

8.30 Additional Information to Consider Before Imposing Sentence

B. Improper Considerations

Insert the following text after the third bullet on page 146:

Resentencing is required when a sentencing court indicates that the sentencing process “might go a whole lot easier” if the defendant produced the weapon involved in the offense when, although the jury convicted the defendant of felony-firearm, the defendant maintained his innocence of the weapons charge. *People v Conley*, ____ Mich App ____, ____ (2006).

In *Conley*, the defendant admitted to much of the conduct involved in his convictions for first-degree home invasion and felonious assault but he consistently denied that he possessed a weapon at the time of the offenses. At the defendant’s sentencing hearing the trial court invited the defendant to further incriminate himself:

“The trial court did not expressly state that if [the defendant] provided the location of the gun he would receive a lesser sentence. However, the offer of such a quid-pro-quo clearly existed. The trial court stated, ‘[the defendant] may wish to appeal the conviction, but it might go a whole lot easier if we had the weapon that was discussed in this matter.’ Clearly, the implication from this was that [the defendant] would have been sentenced more leniently if he informed the trial court of the gun’s location and thereby effectively admitted his guilt.” *Conley, supra* at ____.

Part IX—Sentence Departures

8.51 Exceptions: When a Departure Is Not a Departure

Delete the second paragraph of the November 2005 update to page 209 and insert the following text:

By peremptory order dated March 10, 2006, the Michigan Supreme Court vacated the Court of Appeals opinion in *People v Buehler (On Remand)*, 268 Mich App 475 (2005). *People v Buehler*, ___ Mich ___ (2006). The Supreme Court remanded the case to the Court of Appeals to consider two questions:

“(1) whether the circuit court provided substantial and compelling reasons for imposing a sentence that the circuit court acknowledged was a departure from the guidelines, . . . and (2) whether any term of imprisonment that may be imposed by the circuit court is controlled by the legislative sentencing guidelines or by the indeterminate sentence prescribed by MCL 750.335a.”

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

A. Invalid Sentences

Insert the following text after the first bulleted paragraph at the top of page 211:

*See the April 2006 update to page 146 for more information about this case.

Where a trial court implies that it might impose a more lenient sentence if the defendant provided the court with information that required the defendant to effectively admit his guilt, the court “violated [the defendant’s] constitutional right against self-incrimination” and the sentence is invalid. *People v Conley*, ___ Mich App ___, ___ (2006).*

The statutory mandate of MCL 769.34(10)—a minimum sentence within the appropriate guidelines range must be affirmed on appeal unless it was based on inaccurate information or a scoring error—does not override the relief due a defendant for a “sentencing error of constitutional magnitude.” According to the *Conley* Court:

“It is axiomatic that a statutory provision, such as MCL 769.34(10), cannot authorize action in violation of the federal or state constitutions.” *Conley, supra* at ___.

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

B. Correcting Invalid Sentences

Insert the following text after the first paragraph near the bottom of page 212:

The requirement that a trial court articulate the reasons for imposing a sentence may be satisfied by the court's explicit or implicit indication that it relied on the sentencing guidelines in fashioning the sentence imposed. *People v Conley*, ___ Mich App ___, ___ (2006).

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

C. No Remedy Available, Permitted, or Necessary

Insert the following text after the first full paragraph near the top of page 214:

Note: However, a defendant must be resentenced when the initial sentence is based on a cell range resulting from a scoring error, even if the court's initial sentence falls within the cell range indicated after the error is corrected. *People v Francisco*, ___ Mich ___, ___ (2006).

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

D. Sentences Imposed Under the Statutory Guidelines

1. Sentences Within the Guidelines Range

Insert the following text after the first paragraph in this sub-subsection on page 215:

See e.g., *People v Conley*, ___ Mich App ___, ___ (2006). Where a sentencing court implies it would be more lenient if the defendant provided the weapon used in the offense even though the defendant has consistently maintained his innocence with regard to weapon use, the court violates the defendant's constitutional right against self-incrimination—an error that overrides the legislative mandate in MCL 769.34(10).

See also *People v Francisco*, ___ Mich ___, ___ (2006). A defendant must be resentenced when his or her sentence is derived from a cell range resulting from a scoring error, even when the sentence imposed is within the cell range indicated after the error is corrected.

March 2006

Update: Criminal Procedure Monograph 8—Felony Sentencing

Part II—Scoring the Statutory Sentencing Guidelines

8.6 Scoring an Offender's Offense Variables (OVs)

J. OV 9—Number of Victims

2. Case Law Under the Statutory Guidelines

Add the following text to the February 2006 update to page 58:

Note: On February 15, 2006, the Court of Appeals vacated section III of its opinion in *People v Melton*, ___ Mich App ___, ___ (2006), and pursuant to MCR 7.215(J)(3), ordered that the conflict between *Melton, supra*, and *People v Knowles*, 256 Mich App 53, 61–63 (2003), be resolved by a special panel convened for that purpose.

February 2006

Update: Criminal Procedure Monograph 8—Felony Sentencing

Part II—Scoring the Statutory Sentencing Guidelines

8.5 Scoring an Offender’s Prior Record Variables (PRVs)

G. PRV 5—Prior Misdemeanor Convictions or Prior Misdemeanor Juvenile Adjudications

Insert the following text after the November 2005 update to page 29:

Previous “non-OUIL alcohol-related convictions” are not convictions involving a controlled substance for purposes of scoring PRV 5. *People v Endres*, ___ Mich App ___, ___ (2006).

Part II—Scoring the Statutory Sentencing Guidelines

8.5 Scoring an Offender's Prior Record Variables (PRVs)

H. PRV 6—Relationship to the Criminal Justice System

1. Case Law Under the Statutory Guidelines

Insert the following text before the partial paragraph at the bottom of page 31:

A defendant has “a prior relationship with the criminal justice system” for purposes of scoring PRV 6 when disposition of a misdemeanor crime committed by the defendant is pending at the time the defendant committed the sentencing offense. *People v Endres*, ___ Mich App ___, ___ (2006).

Part II—Scoring the Statutory Sentencing Guidelines

8.6 Scoring an Offender's Offense Variables (OVs)

D. OV 3—Physical Injury to a Victim

2. Case Law Under the Statutory Guidelines

Insert the following text before the partial paragraph at the bottom of page 44:

Points are appropriately scored for OV 3 only where there is record evidence of a victim's injury; a prosecutor's file notes do not constitute record evidence. *People v Endres*, ___ Mich App ___, ___ (2006).

Part II—Scoring the Statutory Sentencing Guidelines

8.6 Scoring an Offender's Offense Variables (OVs)

J. OV 9—Number of Victims

2. Case Law Under the Statutory Guidelines

Insert the following text after the third paragraph on page 58:

Note: In *People v Melton*, ___ Mich App ___, ___ (2006), a panel of the Court of Appeals expressed its disagreement with *People v Knowles*, 256 Mich App 53, 61–63 (2003), in which the Court held that financial institutions could be victims for purposes of OV 9. Although the *Melton* Court was obligated by *Knowles* to affirm the defendant's OV 9 score, the *Melton* Court explained that OV 9 was not intended to account for victims who suffered financial injury, or, as was the case in *Melton*, for victims deprived of other property, and the Court recommended that the issue be resolved by submission to a conflicts panel pursuant to MCR 7.215(J)(3).

Part II—Scoring the Statutory Sentencing Guidelines

8.6 Scoring an Offender's Offense Variables (OVs)

T. OV 19—Threat to the Security of a Penal Institution or Court or Interference with the Administration of Justice or Emergency Services

Insert the following text after the last full paragraph at the bottom of page 79:

A defendant's conduct is properly scored under OV 19 where the defendant threatens to kill a victim of the crime committed. *People v Endres*, ___ Mich App ___, ___ (2006). Without regard to a defendant's intention when the threat was issued, fifteen points are appropriate because the "threats resulted in the interference with the administration of justice, either by preventing the victim from coming forward sooner or impacting his testimony against defendant." *Endres, supra* at ___.

Part VII—Fines, Costs, Assessments, and Restitution

Effective January 1, 2006, 2005 PA 316 amended the Code of Criminal Procedure to add MCL 769.1k. Insert the following text before the first paragraph in Part VII, near the bottom of page 156:

MCL 769.1k provides a general statutory basis for a court's authority to impose specified monetary penalties when sentencing a defendant and to collect the amounts owed at any time. MCL 769.1k states:

“(1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:

“(a) The court shall impose the minimum state costs as set forth in [MCL 769.1j].

“(b) The court may impose any or all of the following:

“(i) Any fine.

“(ii) Any cost in addition to the minimum state cost set forth in subdivision (a).

“(iii) The expenses of providing legal assistance to the defendant.

“(iv) Any assessment authorized by law.

“(v) Reimbursement under [MCL 769.1f].

“(2) Subsection (1) applies regardless of whether the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation.

“(3) The court may require the defendant to pay any fine, cost, or assessment ordered to be paid under this section by wage assignment.

“(4) The court may provide for the amounts imposed under this section to be collected at any time.”

8.33 Fines

Effective January 1, 2006, 2005 PA 316 added MCL 769.1k, a statute authorizing a court to impose “any fine” on a defendant at the time of sentencing, at the time a deferred adjudication of guilt is entered, or at the time

sentencing is delayed. Replace the first sentence in the first paragraph near the top of page 157 with the following text:

Pursuant to MCL 769.1k, courts have general authority to impose “any fine” on a convicted defendant. According to MCL 769.1k(1)(b)(i), at the time of sentencing or a delay in sentencing or entry of a deferred judgment of guilt, a court may impose any fine on a defendant convicted by plea (guilty or nolo contendere) or found guilty by the court after a hearing or trial. Specific authority to impose a fine, and the maximum amount of that fine, is often included in the language of the applicable penal statute.

Add the following text to the second paragraph on page 157:

The court may require a defendant to pay by wage assignment any fine imposed under MCL 769.1k, and the court may provide that any fine imposed under MCL 769.1k be collected at any time. MCL 769.1k(3), (4).

As a condition of probation.

Insert the following text after the last paragraph on page 157:

The fines authorized by MCL 769.1k(1)(b)(i) also apply when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(2). A defendant may be required to pay by wage assignment any fine imposed under MCL 769.1k, MCL 769.1k(3), and the court may provide that those fines be collected at any time, MCL 769.1k(4).

Part VII—Fines, Costs, Assessments, and Restitution

8.34 Costs

Effective January 1, 2006, 2005 PA 316 amended the Code of Criminal Procedure to add MCL 769.1k. Insert the following text after the first paragraph on page 158:

MCL 769.1k is a procedural statute that provides a court with general authority to impose “[a]ny cost in addition to the minimum state cost” when sentencing a defendant in certain circumstances. MCL 769.1k(1)(b)(ii). In addition to the authority to impose costs, MCL 769.1k(3) authorizes a court to order that a defendant pay by wage assignment any of the costs authorized in MCL 769.1k(1). A court may provide for the collection of costs imposed under MCL 769.1k at any time. MCL 769.1k(4).

As a condition of probation.

Insert the following text before the paragraph beginning with “When determining the appropriate amount of costs...” on page 158:

The costs authorized by MCL 769.1k(1)(b)(ii) also apply when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(2). A defendant may be required to pay by wage assignment any cost imposed under MCL 769.1k, MCL 769.1k(3), and the court may provide that those costs be collected at any time, MCL 769.1k(4).

Part VII—Fines, Costs, Assessments, and Restitution

8.34 Costs

C. Costs of a Court-Appointed Attorney

Effective January 1, 2006, 2005 PA 316 added MCL 769.1k to the Code of Criminal Procedure. Insert the following text before the first paragraph on page 166:

MCL 769.1k provides a court with general authority to impose costs on a defendant at the time a defendant is sentenced, at the time a defendant's sentence is delayed, or at the time entry of an adjudication of guilt is deferred. MCL 769.1k(1)(b)(iii) specifically permits a court to impose on a defendant "[t]he expenses of providing legal assistance to the defendant." In addition to the authority to impose on a defendant the costs of his or her legal representation, MCL 769.1k(3) authorizes a court to order that a defendant pay by wage assignment the cost of legal representation imposed pursuant to MCL 769.1k(1)(b)(iii). A court may provide for the collection of any costs imposed under MCL 769.1k(1) at any time. MCL 769.1k(4).

As a condition of probation.

Insert the following text immediately before Section 8.35 near the bottom of page 167:

The general authority to impose the monetary penalties listed in MCL 769.1k(1)(a) and (b) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(2). A defendant may be required to pay by wage assignment the costs of his or her legal representation imposed pursuant to MCL 769.1k(1)(b)(iii), MCL 769.1k(3), and the court may provide that those costs be collected at any time, MCL 769.1k(4).

Part VII—Fines, Costs, Assessments, and Restitution

8.35 Minimum State Costs

Effective January 1, 2006, 2005 PA 316 amended the Code of Criminal Procedure to add MCL 769.1k. Insert the following text after the **Note** on the bottom of page 167:

MCL 769.1k provides a court with general authority to impose several specific monetary penalties at the time a defendant is sentenced, at the time a defendant's sentence is delayed, or at the time entry of an adjudication of guilt is deferred. MCL 769.1k(1)(a) expressly requires a court to "impose the minimum state costs as set forth in [MCL 769.1j]." The language used in MCL 769.1k(1)(a) does not appear to clarify or alter the condition discussed in the above **Note**. The new statutory provision mandates only that a court impose the minimum state costs according to MCL 769.1j, and MCL 769.1j conditions the imposition of minimum state costs on whether a defendant is ordered to pay other fines, costs, or assessments.

In addition to the authority to impose minimum state costs, MCL 769.1k(3) authorizes a court to order that a defendant pay by wage assignment any of the costs authorized in MCL 769.1k(1). A court may provide for the collection of minimum state costs imposed under MCL 769.1k at any time. MCL 769.1k(4).

As a condition of probation.

Insert the following text after the paragraph at the top of page 168:

The general authority to impose the monetary penalties listed in MCL 769.1k(1)(a) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(2). A defendant may be required to pay by wage assignment the minimum state costs imposed pursuant to MCL 769.1k(1)(a), MCL 769.1k(3), and the court may provide that those costs be collected at any time, MCL 769.1k(4).

Part VII—Fines, Costs, Assessments, and Restitution

8.36 Crime Victim Assessment

Effective January 1, 2006, 2005 PA 315 amended MCL 780.905 to require payment of the crime victim assessment whenever a defendant is charged with a qualifying offense and the charge is resolved in a manner specified by the statute. Replace the first paragraph and corresponding side note on page 168 with the following text:

Whenever an individual is charged with a felony offense and the charge “is resolved by conviction, by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred entry of judgment of guilt, or in another way that is not an acquittal or unconditional dismissal,” the court must order the individual to pay a \$60.00 crime victim assessment. MCL 780.905(1). In contrast to the minimum state cost, which must be ordered for each felony conviction arising from a single case, only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).

Note: In addition to felony offenses, crime victim assessments must be ordered in cases involving persons charged with “serious” or “specified” misdemeanor offenses. MCL 780.905(1). See Miller, *Crime Victim Rights Manual—Revised Edition* (MJI, 2005), Section 2.8, for more information about crime victim assessments.

Also effective January 1, 2006, 2005 PA 316 amended the Code of Criminal Procedure to add MCL 769.1k. Add the following text after the first paragraph in this section:

MCL 769.1k provides a court with general authority to impose “[a]ny assessment authorized by law” on a defendant at the time a defendant is sentenced, at the time a defendant’s sentence is delayed, or at the time entry of an adjudication of guilt is deferred. MCL 769.1k(1)(b)(iv). MCL 769.1k(3) authorizes a court to order that a defendant pay by wage assignment an assessment imposed pursuant to MCL 769.1k(1)(b)(iv). A court may provide for the collection of any assessment imposed under MCL 769.1k(1) at any time. MCL 769.1k(4).

As a condition of probation.

Insert the following text immediately before Section 8.37 on page 168:

The general authority to impose the monetary penalties in MCL 769.1k(1)(b) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(2). MCL 769.1k(3) authorizes a court to order that a defendant pay by wage assignment an

assessment imposed pursuant to MCL 769.1k(1)(b)(iv). A court may provide for the collection of any assessment imposed under MCL 769.1k(1) at any time. MCL 769.1k(4).

Part VIII—Specific Types of Sentences

8.40 Probation

Mandatory terms and conditions of probation.

Effective January 1, 2006, 2005 PA 316 amended the Code of Criminal Procedure to add MCL 769.1k. Insert the following text on page 173 after the list of items preceded by dashes and before the paragraph beginning with “If a defendant is placed on probation...”:

MCL 769.1k(1)(a) requires a court to impose minimum state costs on a defendant at the time a defendant is sentenced, at the time a defendant’s sentence is delayed, or at the time entry of an adjudication of guilt is deferred. MCL 769.1k(1)(a) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(2).

For minimum state costs ordered pursuant to MCL 769.1k, MCL 769.1k(3) authorizes a court to order that a defendant pay such costs by wage assignment. In addition, a court may provide for the collection of any costs imposed pursuant to MCL 769.1k at any time. MCL 769.1k(4).

Part VIII—Specific Types of Sentences

8.40 Probation

Discretionary terms and conditions.

Effective January 1, 2006, 2005 PA 316 amended the Code of Criminal Procedure to add MCL 769.1k. Insert the following text on page 175 immediately before “**Amending an order of probation**”:

MCL 769.1k(1)(b) provides a court with general authority to impose a fine, costs, expenses of providing legal assistance, assessments, and reimbursement under MCL 769.1f on a defendant at the time a defendant is sentenced, at the time a defendant’s sentence is delayed, or at the time entry of an adjudication of guilt is deferred. MCL 769.1k(1)(b) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(2). A defendant may be required to pay by wage assignment the penalties imposed pursuant to MCL 769.1k(1)(b). MCL 769.1k(3). The court may provide that those penalties be collected at any time. MCL 769.1k(4).

Part VIII—Specific Types of Sentences

8.41 Delayed Sentencing

Other costs.

Effective January 1, 2006, 2005 PA 316 amended the Code of Criminal Procedure to add MCL 769.1k. Insert the following text immediately before Section 8.42 on page 179:

MCL 769.1k provides a court with general authority to impose fines, costs, expenses of providing legal assistance, assessments, and reimbursement under MCL 769.1f on a defendant at the time a defendant's sentence is delayed. MCL 769.1k(3) authorizes a court to order that a defendant pay those monetary penalties by wage assignment. In addition, a court may provide for the collection of any penalties imposed pursuant to MCL 769.1k at any time. MCL 769.1k(4).

Part VIII—Specific Types of Sentences

8.42 Deferred Adjudication of Guilt

E. Terms and Conditions of Probation Imposed Pursuant to Deferred Adjudication Provisions

Effective January 1, 2006, 2005 PA 316 amended the Code of Criminal Procedure to add MCL 769.1k. Insert the following text after the first paragraph on page 183:

MCL 769.1k provides a court with general authority to impose fines, costs, expenses of providing legal assistance, assessments, and reimbursement under MCL 769.1f on a defendant at the time entry of an adjudication of guilt is deferred. The general authority to impose the monetary penalties listed in MCL 769.1k(1)(a) and (b) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(2). MCL 769.1k(3) authorizes a court to order that a defendant pay those monetary penalties by wage assignment. In addition, a court may provide for the collection of the penalties imposed pursuant to MCL 769.1k at any time. MCL 769.1k(4).

Part VIII—Specific Types of Sentences

8.43 Youthful Trainee Act—Deferred Adjudication

Terms and conditions imposed pursuant to deferred adjudication provisions.

Effective January 1, 2006, 2005 PA 316 amended the Code of Criminal Procedure to add MCL 769.1k. Insert the following text on page 190 before the paragraph beginning with “**Court’s discretion over a youthful trainee’s status**”:

MCL 769.1k provides a court with general authority to impose fines, costs, expenses of providing legal assistance, assessments, and reimbursement under MCL 769.1f on a defendant at the time entry of an adjudication of guilt is deferred. The general authority to impose the monetary penalties listed in MCL 769.1k(1)(a) and (b) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(2). MCL 769.1k(3) authorizes a court to order that a defendant pay those monetary penalties by wage assignment. In addition, a court may provide for the collection of the penalties imposed pursuant to MCL 769.1k at any time. MCL 769.1k(4).

Effective January 1, 2006, 2005 PA 315 amended MCL 780.905 to require payment of the crime victim assessment whenever a defendant is charged with a qualifying offense and the charge is resolved in a manner specified by the statute. Insert the following text after the update described above:

Whenever an individual charged with a felony offense is assigned to youthful trainee status, the court must order the individual to pay a \$60.00 crime victim assessment. MCL 780.905(1). Only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).

Note: In addition to felony offenses, crime victim assessments must be ordered in cases involving persons charged with “serious” or “specified” misdemeanor offenses. MCL 780.905(1). See Miller, *Crime Victim Rights Manual—Revised Edition* (MJI, 2005), Section 2.8, for more information about crime victim assessments.

Update: Criminal Procedure Monograph 8—Felony Sentencing

Part IV—Habitual Offender Provisions

8.16 Sentencing an Offender for a Subsequent “Major Controlled Substance Offense”

A. Mandatory Sentence Enhancement—MCL 333.7413(1) and (3)

Replace the paragraph beginning near the bottom of page 105 and continuing on the top of page 106 with the following text:

As written, the general habitual offender statutes do not require a sentencing court to follow the Public Health Code’s sentencing scheme unless the offender’s subsequent conviction is for a “major controlled substance offense.” However, as discussed in subsection (B), below, it appears that a sentencing court may sentence an offender convicted of a subsequent “major controlled substance offense” under either of the two sentencing schemes, without regard to the directive found in the general habitual offender statutes for subsequent “major controlled substance offenses.”

Part IV—Habitual Offender Provisions

8.16 Sentencing an Offender for a Subsequent “Major Controlled Substance Offense”

B. Application of the General Habitual Offender Statutes to Cases Involving Controlled Substance Offenses

Insert the following case summary immediately before subsection (C) near the top of page 107:

According to the Michigan Supreme Court, sentence enhancement under either the habitual offender sentencing scheme or the Public Health Code’s subsequent offender sentencing scheme is proper where a defendant with prior felony convictions is subsequently convicted of a “major controlled substance offense.” *People v Wyrick (Wyrick II)*, ___ Mich ___ (2005).

In *Wyrick*, the defendant was convicted of two drug-related offenses, one of which was a “major controlled substance offense.” Specifically, the defendant was convicted of possession of marijuana—second offense, a misdemeanor, and the felony offense of possession with intent to deliver cocaine, one of the “major controlled substance offenses.” Based on the number of his prior felony convictions, the trial court sentenced the defendant as a fourth habitual offender pursuant to MCL 769.12. *People v Wyrick (Wyrick I)*, 265 Mich App 483, 485 (2005).

After disposing of the defendant’s appeal on grounds not relevant to the discussion here, the Court of Appeals then addressed an additional issue that had not been raised by either party—whether the trial court’s sentence enhancement under the general habitual offender statutes was proper in light of the statutory directive for imposing sentence on a defendant whose subsequent conviction is for a “major controlled substance offense.” *Wyrick I, supra* at 493. The Court of Appeals concluded that adherence to the plain language used in the general habitual offender statutes, and in MCL 769.12 specifically, required that the defendant’s sentence, if enhanced, be enhanced pursuant to the provisions in the Public Health Code. Consequently, the Court remanded the case and instructed the trial court to amend the defendant’s judgment of sentence to reflect that his sentence was enhanced pursuant to the Public Health Code’s subsequent offender provision, and not pursuant to the habitual offender provision. *Wyrick I, supra* at 494.

In *Wyrick II*, the Michigan Supreme Court, by peremptory order, reversed the Court of Appeals. Relying on its decision in *People v Primer*, 444 Mich 269, 271–272 (1993), the Michigan Supreme Court’s order vacated

“the Court of Appeals decision to remand the case to the trial court to alter the reference in the judgment of conviction from enhancement under the Habitual Offender Statute, MCL 769.12,

to enhancement under the Public Health Code, MCL 333.7413(2). This change is unnecessary because the prosecutor may seek a greater sentence under the Habitual Offender Statute even when a defendant is sentenced under the Public Health Code.” *Wyrick II*, *supra* at ____.

Part VI—Fashioning an Appropriate Sentence

8.28 Concurrent and Consecutive Sentences

Replace the first full paragraph on page 136 with the following text:

*Peremptory order vacating the Court of Appeals decision in *People v Wyrick*, 265 Mich App 483 (2005).

For purposes of the Code of Criminal Procedure, misdemeanors punishable by more than one year (“two-year misdemeanors”) are felonies for purposes of consecutive sentencing. *People v Smith*, 423 Mich 427, 434 (1985). However, for purposes of the Public Health Code, offenses “expressly designated” as misdemeanors retain their character as misdemeanors without regard to the length of incarceration possible for conviction of the offense. *People v Wyrick*, ___ Mich ___ (2005) (misdemeanor possession of marijuana, second offense, does *not* constitute a felony for purposes of the consecutive sentencing provision in MCL 333.7401(3)).*

Part VII—Fines, Costs, Assessments, and Restitution

8.37 Restitution

Effective January 1, 2006, 2005 PA 184 amended MCL 780.766(2) to require a court to order restitution in conjunction with cases treated under the youthful trainee act, by a delayed sentence or deferred adjudication, or using another informal method. On page 168, insert the following sentence after the first sentence of the second paragraph:

Restitution is also mandatory “[f]or an offense that is resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal.” MCL 780.766(2).

Part VII—Fines, Costs, Assessments, and Restitution

8.38 Use of Bail Money to Pay Costs, Fines, Restitution, and Other Assessments

Effective January 1, 2006, 2005 PA 184 amended MCL 780.766a(1) to address allocation of payments in cases where a person must pay fines, costs, restitution, and other payments in more than one proceeding and fails to specify the proceeding to which a payment applies. Insert the following text before Section 8.39 near the bottom of page 171:

MCL 780.766a(1) governs the allocation of money collected from an offender who is obligated to make payments in more than one proceeding and who, when making a payment, fails to specify the proceeding to which the payment applies. MCL 780.766a(1) states in part:

“If a person is subject to fines, costs, restitution, assessments, probation or parole supervision fees, or other payments in more than 1 proceeding in a court and if a person making a payment on the fines, costs, restitution, assessments, probation or parole supervision fees, or other payments does not indicate the proceeding for which the payment is made, the court shall first apply the money paid to a proceeding in which there is unpaid restitution to be allocated as provided in this section.”

Part VIII—Specific Types of Sentences

8.40 Probation

Effective January 1, 2006, MCL 771.2a was amended to require that specific conditions be ordered for a defendant placed on probation under MCL 771.2a(5) after conviction of a “listed offense.”* Insert the following text before the last paragraph on page 176:

Sex offenders and probation orders. Except for the non-probationable offenses in MCL 771.1 and as otherwise provided by law, a court may place an individual convicted of a “listed offense”* on probation for any term of years but not less than five years. MCL 771.2a(5). Additional conditions of probation must be ordered when an individual is placed on probation under MCL 771.2a(5). Subject to the provisions in MCL 771.2a(7)–(11), discussed below, the court must order an individual placed on probation under MCL 771.2a(5) **not** to do any of the following:

- reside within a student safety zone, MCL 771.2a(6)(a);
- work within a student safety zone, MCL 771.2a(6)(b); or
- loiter within a student safety zone, MCL 771.2a(6)(c).

A “student safety zone” is defined as the area that lies 1,000 feet or less from school property. MCL 771.2a(12)(f).

For purposes of MCL 771.2a, “school” and “school property” are defined in MCL 771.2a(12) as follows:

“(d) ‘School’ means a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12. School does not include a home school.

“(e) ‘School property’ means a building, facility, structure, or real property owned, leased, or otherwise controlled by a school, other than a building, facility, structure, or real property that is no longer in use on a permanent or continuous basis, to which either of the following applies:

“(i) It is used to impart educational instruction.

“(ii) It is for use by students not more than 19 years of age for sports or other recreational activities.”

Individuals exempted from probation under MCL 771.2a(5). Even if a person was convicted of a “listed offense,” MCL 771.2a(11) permits the court

*2005 PA 126.

**“Listed offenses” are described in MCL 28.722 of the Sex Offenders Registration Act.

to exempt that person from being placed on probation under subsection (5) if either of the following circumstances apply:

“(a) The individual has successfully completed his or her probationary period under [the youthful trainee act] for committing a listed offense and has been discharged from youthful trainee status.

“(b) The individual was convicted of committing or attempting to commit a violation solely described in [MCL 750.520e(1)(a)*], and at the time of the violation was 17 years of age or older but less than 21 years of age and is not more than 5 years older than the victim.”

*Fourth-degree CSC where the individual is at least 5 years older than the victim and the victim is at least 13 years of age but less than 16 years of age.

Exceptions to the mandatory probation conditions concerning “school safety zones.” Under the circumstances described below, the prohibitions found in MCL 771.2a(6)(a)–(c) do not apply to individuals convicted of a “listed offense.”

Residing within a student safety zone. The court shall not prohibit an individual on probation after conviction of a “listed offense” from residing within a student safety zone, MCL 771.2a(6)(a), if any of the following apply:*

*MCL 771.2a(7)(a)–(c), effective January 1, 2006. 2005 PA 126.

“(a) The individual is not more than 19 years of age and attends secondary school or postsecondary school, and resides with his or her parent or guardian. However, an individual described in this subdivision shall be ordered not to initiate or maintain contact with a minor within that student safety zone. The individual shall be permitted to initiate or maintain contact with a minor with whom he or she attends secondary or postsecondary school in conjunction with that school attendance.

“(b) The individual is not more than 26 years of age, attends a special education program, and resides with his or her parent or guardian or in a group home or assisted living facility. However, an individual described in this subdivision shall be ordered not to initiate or maintain contact with a minor within that student safety zone. The individual shall be permitted to initiate or maintain contact with a minor with whom he or she attends a special education program in conjunction with that attendance.

“(c) The individual was residing within that student safety zone at the time the amendatory act that added this subdivision was enacted into law. However, if the individual was residing within the student safety zone at the time the amendatory act that added this subdivision was enacted into law, the court shall order the individual not to initiate or maintain contact with any minors within that student safety zone. This subdivision does not prohibit the court from allowing contact with any minors named in the

probation order for good cause shown and as specified in the probation order.”

In addition to above exceptions, the prohibition against residing in a student safety zone, MCL 771.2a(6)(a), does not prohibit a person on probation after conviction of a “listed offense” from “being a patient in a hospital or hospice that is located within a student safety zone.” MCL 771.2a(8). The hospital exception does not apply to a person who initiates or maintains contact with a minor in that student safety zone. *Id.*

Working within a student safety zone. If a person on probation under MCL 771.2a(5) was working within a student safety zone at the time the amendatory act adding these prohibitions was enacted into law, he or she cannot be prohibited from working in that student safety zone, MCL 771.2a(6)(b). MCL 771.2a(9). If a person was working within a student safety zone at the time of this amendatory act, “the court shall order the individual not to initiate or maintain contact with any minors in the course of his or her employment within that safety zone.” *Id.* As with MCL 771.2a(7)(c), for good cause shown, a court is not prohibited by MCL 771.2a(9) from allowing the probationer contact with any minors named in the probation order and as specified in the probation order. MCL 771.2a(9).

If an individual on probation under MCL 771.2a(5) only intermittently or sporadically enters a student safety zone for work purposes, the court shall not impose the condition in MCL 771.2a(6)(b) that would prohibit the person from working in a student safety zone. MCL 771.2a(10). Even when a person intermittently or sporadically works within a student safety zone, he or she shall be ordered “not to initiate or maintain contact with any minors in the course of his or her employment within that safety zone.” *Id.* For good cause shown and as specified in the probation order, the court may allow the person contact with any minors named in the order. *Id.*

Part VIII—Specific Types of Sentences

8.47 Special Alternative Incarceration (SAI) Units—“Boot Camp”

C. Placement in an SAI Program After a Sentence of Imprisonment

Effective January 1, 2006, 2005 PA 184 added to the felony article in the Crime Victim’s Rights Act a notice provision specific to defendants considered by the Department of Corrections to be candidates for placement in an SAI unit. Insert the following text immediately before Part IX on page 197:

Notice to crime victims required. When requested in writing by a crime victim, the Crime Victim’s Rights Act requires that notice of a defendant’s prospective SAI placement be given to that victim. MCL 780.763a(3) states:

“If the department of corrections determines that a defendant who was, in the defendant’s judgment of sentence, not prohibited from being or permitted to be placed in the special alternative incarceration unit established under . . . MCL 798.13, meets the eligibility requirements of . . . MCL 791.234a, the department of corrections shall notify the victim, if the victim has submitted a written request for notification under [MCL 780.769], of the proposed placement of the defendant in the special alternative incarceration unit not later than 30 days before placement is intended to occur. In making the decision on whether or not to object to the placement of the defendant in a special alternative incarceration unit as required by . . . MCL 791.234a, the sentencing judge or the judge’s successor shall review an impact statement submitted by the victim under [MCL 780.764].”